UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, - against - ENRON CORP., et al., Defendants,	§	Civil Action No. H-01-3624 (Consolidated) CLASS ACTION
This Document Relates To: RALPH A. WILT, JR., Plaintiff, - against - ANDREW S. FASTOW, et al. Defendants.	§	Civil Action No. H-02-0576

CERTAIN DEFENDANTS' MOTION TO STRIKE THE FIRST AMENDED COMPLAINT IN *WILT V. FASTOW*

604

1. Defendant Arthur Andersen, LLP ("Andersen") and the defendants listed in footnote 1 below respectfully move this Court, pursuant to its inherent authority and Rule 42(a) of the Federal Rules of Civil Procedure, to strike the First Amended Complaint ("Amended Complaint") filed on March 28, 2002 in Wilt v. Fastow, No. H-02-0576.[1]

PRELIMINARY STATEMENT

2. On December 12, 2001, Judge Lee H. Rosenthal of this Court signed an order consolidating the litigation relating to the Enron Corporation ("Enron"), and noting that "[t]hese cases all arise from a common core of operative facts. They are filed against common defendants. Many of the cases contain identical claims. The legal issues will overlap. Much of the discovery will be common to all the cases." Newby v. Enron Corp., No. H-01-3624 (Consol.), mem. op. at 17 (S.D. Tex. Dec. 12, 2001). The order provided that any party objecting to consolidation could file an objection within ten days. Id. at 19. Two parties did object, including the individual plaintiffs in Odam v. Enron Corp., No. H-01-3914.

3. After Judge Rosenthal ordered all Enron-related litigation consolidated, Plaintiff Ralph A. Wilt, Jr. ("Wilt") filed an original complaint in this Court on February 14, 2002, alleging state law fraud

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[1]The request for relief in this motion is likewise sought by the following parties: Kenneth L. Lay, Jeffrey K. Skilling, Andrew S. Fastow, Richard A. Causey, James V. Derrick, Jr., Mark A. Frevert, Stanley C. Horton, Kenneth D. Rice, Richard B. Buy, Joseph M. Hirko, Ken L. Harrison, Steven J. Kean, Rebecca P. Mark-Jusbasche, Michael S. McConnell, Jeffrey McMahon, Cindy K. Olson, Mark E. Koenig, Kevin P. Hannon, Lawrence Greg Whalley, Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, Joe H. Foy, John A. Urquhart, Thomas H. Bauer, Debra A. Cash, David Stephen Goddard, Jr., Michael M. Lowther, Michael C. Odom, John E. Stewart, Benjamin S. Neuhausen, Nancy Temple, Roger D. Willard, Michael J. Kopper, Vinson & Elkins, L.L.P., Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick III., J. Clifford Baxter, Mark J. Metts, and Paula Rieker

claims under the Texas Business & Commerce Code § 27.01 and Texas common law against 58 named defendants and 500 unnamed defendants. Wilt has not alleged any claims under federal law. On February 18, 2002, this Court issued an order specifically consolidating Wilt with the Newby cases. See Wilt v. Fastow, No. 02-CV-0576, Order of Consolidation (S.D. Tex. Feb. 18, 2002). Wilt did not file an objection to consolidation.

4. On February 15, 2002, this Court entered an order naming a lead plaintiff in the Enron-related securities cases that were consolidated under the lead case, Newby. See Newby v. Enron Corp., No. H-01-3624 (Consol.), mem. op. at 83-84 (S.D. Tex. Feb. 15, 2002). The Court declined to divide the Newby action into separate classes or subclasses based on different possible legal claims, noting instead that

> "[T]he central reasons for the consolidation of these suits are that they arise out of a common core of facts, legal issues, deal with overlapping or intertwined Defendants, named or implied, and they attack a [sic] various aspects of an alleged scheme . . . . the Court believes that the litigation should proceed as a unified class with a strong Lead Plaintiff, *at least until the time for class certification.*"

Id. at 62-63 (emphasis added). The Court detailed some of the powers that counsel for lead plaintiff would exercise:

> "Lead Counsel shall henceforth direct and coordinate the prosecution of this action on behalf of *all Plaintiffs' counsel*, including discovery, pretrial conferences, and settlement negotiations with counsel for Defendants."

Id. at 84 (emphasis added). In the same opinion, the Court issued several orders governing the administration of the consolidated Newby cases, id. at 22, 82-84, including an order overruling the Odam plaintiffs' objection to consolidation, id. at 25, 29. The Court reaffirmed that "consolidation, at least pretrial, serves to promote an orderly progression of this very complex litigation." Id. at 28.

5. On February 27, 2002, this Court entered a scheduling order that, inter alia, mandated the filing of a consolidated complaint. Newby v. Enron Corp., No. H-01-3624 (Consol.), sch. order at 5 (S.D. Tex. Feb. 27, 2002). The Court emphasized once again the need for an expeditious and efficient resolution of the consolidated cases, and accordingly set down "what the Court believes to be a workable schedule . . . that will bring this case to resolution in as short a time frame as humanly possible, while serving the interests of justice." Id. at 2.

6. On or about April 1, 2002, Wilt and two new plaintiffs – Kieran J. Mahoney and David I. Levine – filed the Amended Complaint that is the subject of this motion, naming two additional individual defendants, Jeannot Blanchette[2] and John E. Stewart.

7. Vinson & Elkins, a defendant in Wilt, filed a motion (since withdrawn) opposing consolidation of the Wilt case, arguing that Wilt had been improperly consolidated with the Newby actions. Motion of the Vinson & Elkins Defendants to Oppose Consolidation and Sever the Claims Against Them, Wilt v. Fastow, No. H-02-0576 (S.D. Tex. March 4, 2002; filed March 29, 2002). Wilt opposed the motion, arguing "[t]he class actions and Mr. Wilt's case are related and have multiple common issues of fact and law." Response of Plaintiff Ralph A. Wilt, Jr., in Support of the Court's Order of Consolidation and in Opposition to the Vinson & Elkins Defendants' Motion to Sever Themselves From the Consolidated Lead Action, Wilt v. Fastow, No. H-02-0576 (S.D. Tex. March 25, 2002) ("Wilt Response") at 7. Wilt noted that separating his case from the consolidated cases would result in duplicative filings that would unduly consume Court resources and concluded that his

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[2]To movants' knowledge, Mr. Blanchette has never been served with process in this case.

"case was wisely consolidated with Newby, and the requested severance would prove to be a management disaster."[3] Id.

8. The movants agree with Mr. Wilt's conclusion that allowing him to proceed on a separate track at this time would create management difficulties and interfere with the orderly processes for this case established by this Court. In order to address this situation, defendants have submitted to the Court a Motion for Entry of Preliminary Scheduling Order for Complaints Consolidated Into *Newby* and Pursued by Persons Other Than Court-Appointed Lead Plaintiff, that would establish a schedule to enable Defendants to address Wilt and other complaints that may not ultimately be consolidated with Newby. Accordingly, this Court should strike the Amended Complaint pursuant to its inherent authority to manage the cases before it and Rule 42 of the Federal Rules of Civil Procedure because the filing of the Amended Complaint is inconsistent with this Court's prior orders and the orderly administration of these cases.

ARGUMENT

THIS COURT SHOULD STRIKE THE AMENDED COMPLAINT PURSUANT TO ITS INHERENT AUTHORITY AND RULE 42(a) AND THIS COURT'S CONSOLIDATION ORDERS

9. This Court derives its power to manage the consolidated Enron-related lawsuits, including Wilt, primarily from its inherent power to control and manage the cases before it and two positive provisions: Fed. R. Civ. P. Rule 42 and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified in various provisions of the U.S. Code,

[3]After being named in the Newby securities action, Vinson & Elkins withdrew its opposition to consolidation of the Wilt case.

including 15 U.S.C. § 78u-4(a)(3)). See Gordon v. Eastern Air Lines, Inc., 549 F.2d 1006, 1012 (5th Cir. 1977) (describing the court's inherent managerial power); Wilt Response at 9 ("It is well within this Court's managerial discretion to order consolidation. . . .").

10. Rule 42 empowers a court to consolidate cases (for trial or otherwise) that have common questions of law or fact, and to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Fed. R. Civ. P. Rule 42(a); see also Wright & Miller, 9 Fed. Prac. & Proc. Civ. 2d § 2382 (1995 & Supp. 2002). Consolidation may include not only class actions, but individual actions as well. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 565 (1984) (describing an example); 32B Am. Jur. 2d Federal Courts § 2095 & n.14 (1996 & Supp. 2001) (citing cases). Courts have interpreted Rule 42 as authorizing orders that require plaintiffs to file a single consolidated complaint. See Gordon, 549 F.2d at 1015 n.12; Katz v. Realty Equities Corp., 521 F.2d 1354, 1360 (2d Cir. 1975); Hon. Diana E. Murphy, Unified and Consolidated Complaints in Multidistrict Litigation, 132 F.R.D. 597, 597 (1991). Moreover, courts may appoint lead counsel to manage the consolidated cases. Wright & Miller, 9 Fed. Prac. & Proc. Civ. 2d § 2385 (1995 & Supp. 2002) (citing cases). The Fifth Circuit has specifically recognized these powers, and has also noted that they may be exercised despite the opposition of the parties. Gordon, 549 F.2d at 1013; see also In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 262, 264 (D. Minn. 1989) (ordering a consolidated complaint over the objection of two plaintiffs). Courts have refused to accept unauthorized filings outside the consolidation framework. See Farber v. Riker-Maxson Corp., 442 F.2d 457, 459 (2d Cir. 1971) (affirming refusal to entertain nonlead counsel's motion for summary judgment).

11. The PSLRA also authorizes a court to appoint a lead plaintiff in consolidated securities cases. See 15 U.S.C. § 78u-4(a)(3)(B)(ii). Congress considered the lead plaintiff provision to be an important part of the PSLRA. It was designed to prevent lawyer-driven lawsuits on behalf of plaintiffs with little at stake in the litigation. By granting lead plaintiff status to the investor with the most at risk, Congress intended to encourage leadership roles for institutional plaintiffs, who were expected to exercise greater control over their lawyers and over the litigation generally. See S. Rep. 104-98, 1995 WL 372783, at *6, *10-11 (1995); H.R. Conf. Rep. 104-369, 1995 WL 709276, at *32-35 (1995). The Eight Circuit has recognized that "the lead-plaintiff provisions of the PSLRA create significant federal rights that previously did not exist. . . . The lead plaintiff's control over aspects of litigation such as discovery, choice of counsel, assertion of legal theories, retention of consultants and experts, and settlement negotiations give the lead plaintiff decisional muscle that other members of the class lack." In re BankAmerica Corp. Sec. Litig., 263 F.3d 795, 801 (8th Cir. 2001).

12. In this case, this Court has employed these various sources of its power to issue a series of orders that consolidate all of the Enron-related securities cases, including Wilt, and has made clear that a single lead plaintiff is to file a consolidated complaint and direct the litigation in a coordinated manner, at least until the time of class certification.

13. The fact that Wilt is an individual case does not take it outside of the scope of the Court's orders. This Court has already rejected an objection to consolidation by one group of individual plaintiffs in the Odam action. Newby v. Enron Corp., No. H-01-3624 (Consol.), mem. op. at 25 (S.D. Tex. Feb. 15, 2002). The Court reasoned that merely because Odam was an individual action did not change the fact that it overlapped factually and legally with the other Enron-related cases. Wilt

never objected to consolidation. But even if he had, precisely the same reasoning would apply to Wilt as to Odam.

14. In that same memorandum opinion, this Court also appointed a lead plaintiff and directed that

> "Lead counsel shall henceforth direct and coordinate the prosecution of this action *on behalf of all Plaintiffs' counsel*, including discovery, pretrial conferences, and settlement negotiations with counsel for Defendants."

Id. at 84 (emphasis added).

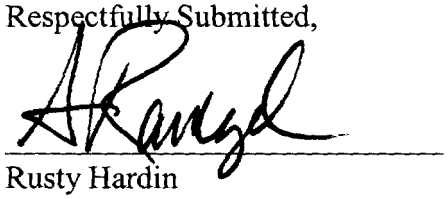
15. Moreover, this Court has made plain its intent for lead counsel to file a consolidated complaint. In its various scheduling orders, the Court repeatedly indicated that it expected a consolidated complaint to be filed. Newby v. Enron Corp., No. H-01-3624 (Consol.), sch. order at 5 (S.D. Tex. February 27, 2002) ("Scheduling Order I"); Newby v. Enron Corp., No. H-01-3624 (Consol.), sch. order at 2 (S.D. Tex. March 8, 2002); Newby v. Enron Corp., No. H-01-3624 (Consol.), sch. order at 2 (S.D. Tex. March 22, 2002). This Court has also emphasized that its management of the case is designed to effect an efficient resolution of the Enron-related lawsuits "in as short a time frame as humanly possible, while serving the interests of justice." Scheduling Order I, at 2. The filing of a consolidated complaint for all of the Newby consolidated cases has been manifest in these orders all along. Allowing individual plaintiffs to file individual pleadings in addition to and alongside the consolidated complaint at this time, thereby necessitating that defendants answer or respond to multiple complaints, would defeat the very purpose of a consolidated pleading.

CONCLUSION

For the reasons given above, this Court should enter an order striking the Amended Complaint in Wilt, and granting other relief as may be just and proper.

Dated: Houston, Texas
May 8, 2002

Respectfully Submitted,



Rusty Hardin
State Bar No. 08972800
S.D. Tex. I.D. No. 19424

RUSTY HARDIN & ASSOCIATES, P.C.
1201 Louisiana, Suite 3300
Houston, Texas 77002
(713) 652-9000
(713) 652-9800 (fax)

Attorney-in-Charge for
Defendant Arthur Andersen LLP

OF COUNSEL
Andrew Ramzel
State Bar No. 00784184
S.D. Tex. I.D. No. 18269
RUSTY HARDIN & ASSOCIATES, P.C.

Daniel F. Kolb
Sharon Katz
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
(212) 450-3633 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2002, the forgoing pleading was served pursuant to the Court's April 5, 2002 Order.

Andrew Ramzel